STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2003
v MILO LORENZO FITZPATRICK, Defendant-Appellant.	No. 236187 Calhoun Circuit Court LC No. 00-004741-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v DESHAWN DARELLE WITCHER, Defendant-Appellant.	No. 236188 Calhoun Circuit Court LC No. 00-004624-FC

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

Following a jury trial, in which defendants were tried jointly, defendant Fitzpatrick was convicted of three counts of assault with intent to commit murder, MCL 750.83, and three counts of felony-firearm, MCL 750.227b(A). He was sentenced as a third-habitual offender, MCL 769.11, to concurrent terms of life imprisonment on the first assault with intent to commit murder conviction, 50 to 75 years' imprisonment on the remaining two counts of assault with intent to commit murder convictions, to be served consecutively to concurrent two years' imprisonment terms for the three felony-firearm convictions.

Defendant Witcher was convicted of three counts of assault with intent to commit murder, MCL 750.83, three counts of felony-firearm, MCL 750.227b(A), and one count of felon in possession of a firearm, MCL 750.224f. He was sentenced as a second-habitual offender, MCL 769.10, in the same manner as defendant Fitzpatrick for the assault with intent to commit murder and felony-firearm convictions. Defendant Witcher was also sentenced to 47 to 90 months' imprisonment for the felon in possession conviction, to be served concurrently with the sentences for his assault with intent to commit murder convictions. Both defendants appeal as of

right. We affirm both defendants convictions and sentences, except for defendant Witcher's sentences on counts III and V, which are vacated. We remand for resentencing on these counts before a different judge.

I. Defendant Fitzpatrick's Appeal Issues

A

Fitzpatrick first argues that the trial court abused its discretion in granting the prosecution's motion to consolidate defendants' trials because he and Witcher had antagonistic defenses, prejudicing his substantial rights. Fitzpatrick asserts that because each argued at trial that he did not fire a gun from the van, the other defendant was necessarily implicated as the shooter, and thus, this "is a classic case of one defendant being pitted against the other." We disagree.

A trial court's decision to sever or join a defendant's trial is reviewed for an abuse of discretion. *People v Hana*, 447 Mich 344, 346; 524 NW2d 682 (1994); MCL 768.5; MCR 6.121(A). Severance is required only when a defendant demonstrates that his substantial rights will be prejudiced by joinder and severance is the only means of rectifying the prejudice. *Hana, supra* at 346; MCR 6.121(C). A defendant must present the court with an affidavit or an offer of proof demonstrating his substantial rights will be prejudiced. *Hana, supra* at 346. Further, there is a strong policy in favor of joint trials. *Id*. at 342.

In *Hana*, our Supreme Court addressed the issue of prejudice in the context of antagonistic defenses, and rejected a per se severance rule in antagonistic defense cases. *Id*. at 348. The *Hana* Court held:

> Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." Moreover, "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." The "tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." [*Id*. at 349; citations and quotations omitted.]

In this case, both defendants denied being a shooter. However, contrary to Fitzpatrick's assertion, this did not automatically implicate the other defendant as the shooter because there was a third person in the van, Ernest Brooks, and the defense alluded to a fourth. Therefore, defendants' defenses were not irreconcilable. Accordingly, Fitzpatrick's substantial rights were not prejudiced and the trial court did not abuse its discretion in granting plaintiff's motion for consolidation.

B

Fitzpatrick next argues that he was denied a fair trial when the trial court improperly admitted certain evidence. The decision whether to admit evidence is within a trial court's discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). This Court reviews such rulings for an abuse of discretion. *Id*. However, if the decision involves a preliminary question

of law, this Court's review is de novo. *Id*. A trial court abuses its discretion when it admits evidence that is inadmissible as a matter of law. *Id*.

Fitzpatrick first argues that Detective Tim Lepper's statement, "The first time I took photographs of suspects he had a street name for one of the people he let use the van," allowed the jury to know that Fitzpatrick had had prior contact with the police. Even if this were true, Fitzpatrick did not object at trial and he cites no law to support his claim of error. Therefore, Fitzpatrick has waived review of this issue. *Mudge v Macomb C*o, 458 Mich 98, 105; 580 NW2d 845 (1998). Regardless, there was no error because when read in context Detective Lepper's testimony did not allude to prior police contact.

Fitzgerald also argues that the trial court erred in admitting evidence of the robbery that occurred in a nearby garage minutes before the shooting incident with police because this was not res gestae evidence.[1] Again, we disagree.

In *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996), the defendant, who was charged with third-degree criminal sexual conduct, objected to the presentation of evidence that he had used marijuana on the night of the alleged misconduct. In upholding the evidence's admission, the Court stated that "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which the disputed events took place." *Id*. at 741. The Court reaffirmed this principle by quoting with approval the following passages from *People v Delgado*, 404 Mich 76, 83; 273 NW2d 395 (1978):

> It is the nature of things that an event often does not occur singly and independently, isolated from all others, but, instead, is connected with some antecedent event from which the fact or event in question follows as an effect from a cause. When such is the case and the antecedent event incidentally involves the commission of another crime, the principle that the jury is entitled to hear the "complete story" ordinarily supports the admission of such evidence.
>
> Stated differently:
>
> "Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." [*Sholl, supra* at 742; internal citations omitted.]

In this case, there was strong evidence implicating Fitzpatrick in the robbery which occurred just prior to the shooting. Most damaging was the distinctive devil's mask that one of the robbers wore and was found in the black van. A saliva sample taken from the mask around the mouth area identified Fitzpatrick as its wearer. A neighbor heard gunshots and saw two men running to the black van parked next to his house. Within minutes, the police arrived and the

[1] Fitzpatrick also argues that evidence of the robbery was inadmissible prior bad acts evidence. However, because the trial court admitted the evidence as res gestae evidence, we do not address this portion of Fitzpatrick's argument.

shooting began. There was significant evidence that the two incidents were connected, and the robbery explained the circumstances of the shootings. Specifically, it explained why Fitzpatrick was in the area, why the police responded to the area, and the motive for shooting at the police, seemingly without provocation. Therefore, we find that the trial court did not abuse its discretion in admitting evidence of the robbery.

Lastly, Fitzpatrick argues that the police videotape from Officer Rivera's patrol car, the portion on which Sergeant Hultink could be heard yelling in pain after the van fled the scene, was inadmissible under MRE 403 because it only served to inflame the passion of the jury and evoke sympathy. However, Fitzpatrick failed to provide this Court with the videotape to review. Nevertheless, even if the objected to portion of the videotape was overly prejudicial, we find any error to be harmless, and thus, reversal is not required, given the overwhelming amount of evidence of Fitzpatrick's involvement in the shooting. *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000).

C

Next, Fitzpatrick asserts that the trial court erred in denying his motion for directed verdict. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). The court may not determine the weight of the evidence or the credibility of the witnesses, regardless of how inconsistent or vague the testimony was. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997).

To prove the crime of assault with intent to murder, the prosecutor must establish: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. The intent to kill may be proven by inference from any facts in evidence. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). The elements of felony firearm are: (1) the possession of a firearm (2) during the commission of, or the attempt to commit, a felony. *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

Here, the evidence showed that defendant Witcher was in the driver's seat, as established by the trajectory of the bullet which hit his leg and his blood that was found on the driver's seat, while the rifles were found on the floor between the first and second bench seats. Officer Rivera stated that he fired at the front portion of the van and testified that based on the forensic evidence, he probably shot Witcher. Viewing this evidence in the light most favorable to the prosecution, one could infer that Witcher remained in the driver's seat throughout the shoot-out.

The evidence also indicated that the majority of the shots were fired from the middle portion of the van where the rifles were found. Because the police officers were initially standing very close together when the shooting began, it can be inferred that the shooter was aiming at all three officers. Also, the evidence established that one shooter was tracking Sergeant Madsen as he took cover behind Officer Rivera's car.

Fitzpatrick sustained a bullet wound to his foot, where the bullet entered the sole of his foot and exited through the top; therefore, Fitzpatrick's foot must have been perpendicular to the to fired bullet in order to sustain the injury. Sergeants Madsen and Hultink testified that they returned fire, aiming at the middle portion of the van. Further, one of Fitzpatrick's bullet wounds was to the outer side of his left leg. Because the passenger side of the van was facing the officers, if Fitzpatrick had been seated facing forward, his outer right leg would be exposed. If he was laying on his stomach, his left outer leg would have been up against the seat back. A reasonable inference can be made that Fitzpatrick was sitting on the second bench seat, with his legs parallel to the floor, facing the officers at the time of the shooting.

Moreover, the devil's mask with Fitzpatrick's DNA on it was found in the middle of the first bench seat and Brooks and an alcohol bottle with Brooks' blood on it was found between the second and third bench seats. Brooks' blood was also found on the seat back and the back of the lower ruffle area of the second bench seat, and on the right rear passenger wall. Based on this evidence, one could logically infer that Brooks was shot at the back of the van.

Fitzpatrick notes, however, that the van fled the scene at a high rate of speed and traveled a short distance before it was found abandoned. Therefore, items or people could have shifted position from where they were at the scene to the position in which they were found. While this is certainly a possibility, the evidence must be viewed in the light most favorable to the prosecution, with all inferences also being drawn in its favor. Doing so, we conclude that a reasonable jury could find that the elements of assault with intent to murder and felony-firearm were proven beyond a reasonable doubt, and thus, the trial court did not err in denying Fitzpatrick's motion for directed verdict.

D

Lastly, Fitzpatrick contends that the trial court abused its discretion in denying his motion for the appointment of a DNA expert to assist appellate counsel. We disagree.

A trial court's decision regarding whether to appoint an expert witness for an indigent defendant is reviewed for an abuse of discretion. *People v Tanner*, 255 Mich App 369, 396-397; 660 NW2d 746 (2003). A defendant is not automatically entitled to the appointment of a DNA expert merely because such evidence was offered against the defendant at trial. *People v Leonard*, 224 Mich App 569, 582-583; 569 NW2d 663 (1997). Affirming the legal principles outlined in *Leonard*, the *Tanner* Court stated:

> [A] defendant must demonstrate something more than a mere possibility of assistance from a requested expert; due process does not require the government automatically to provide indigent defendants with expert assistance upon demand. Rather, a fair reading of these precedents is that a defendant must show the trial court that there exists a reasonable probability both that an expert would be of assistance to the defense and that denial of expert assistance would result in a fundamentally unfair trial. [*Id*. at 397-398, internal quotations and citations omitted.]

"'In other words, to be entitled to an appointed expert, a defendant must show a nexus between the facts of the case and the need for an expert.'" *Id*. at 398, quoting *Leonard, supra* at 582.

However, reversal is only required if the defendant was prejudiced and received a fundamentally unfair trial as a result of not having the expert's assistance. *Id*. at 398.

Whether a defendant is entitled to the appointment of an expert on appeal, or under what circumstances, has not been addressed in Michigan. However, we believe that the legal principles outlined in *Leonard, supra*, are equally applicable at this stage of the litigation; that is, this Court must first determine whether there exists a reasonable probability that the expert would be of assistance to the defendant on appeal and second, whether lack of this assistance would result in foreclosing an appealable issue, rendering the defendant unable to fully exercise his appellate rights.

Fitzpatrick wanted a DNA expert to review the testing procedures of the prosecution's DNA experts who testified at trial. Yet, Fitzpatrick could cite no potential error with the protocol, only stating, "Without oversight by a defense expert *it might well be* that the prosecutor's expert grossly mischaracterized and overstated the serological evidence implicating Defendant in the offense" (emphasis added). Such reasoning is insufficient to establish the need for an expert to be appointed. A defendant must demonstrate something more than a mere possibility of assistance from a requested expert in order to demonstrate that the principles of due process have been violated. *Tanner, supra* at 397. Accordingly, we find that the trial court did not abuse its discretion in denying appellate counsel's motion for the appointment of a DNA expert.

II. Defendant Witcher's Appeal Issues

A

Witcher first argues that the trial court's removal of his court-appointed attorney, Antoinette Frazho, over his objection, violated his Sixth Amendment right to counsel and denied him a fair trial because there was no basis for her disqualification. Witcher asserts that at the time of the motion hearing to disqualify Frazho, there was no potential conflict of interest because defendants' trials were not joined until the following month. We disagree.

First, defendants' preliminary examinations were held jointly. Also, in his answer to the prosecution's motion to disqualify Frazho, Witcher admitted that he and Fitzpatrick were co-defendants. Although defendants' trials had not yet been consolidated, such a motion surely could have been anticipated. Second, even if Witcher had a separate trial, Frazho could have used information gained from her confidential conversation with Fitzpatrick to Witcher's advantage. Therefore, the fact that defendants' trials were consolidated a month later was not indicative of the existence of a potential conflict of interest.

At the time of Frazho's disqualification, co-defendant Fitzpatrick had been appointed a new attorney, John Brundage. Witcher contends that there was no conflict of interest between Frazho and Brundage, because Frazho's former "representation" of Fitzpatrick was limited to appearing on behalf of Mierendorf, Fitzpatrick's former attorney, to adjourn the preliminary examination. MCR 6.005(F) states, in pertinent part,

> When two or more indigent defendants are jointly charged with an offense or offenses or their cases are otherwise joined, the court must appoint separate

> lawyers unassociated in the practice of law for each defendant. Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer.

Frazho had previously represented Fitzpatrick, albeit in a limited capacity, before she was appointed as Witcher's counsel. At the motion hearing, the trial court inquired into the extent to Frazho's discussion with Fitzpatrick and any impact the substance of that conversation might have on her ability to favorably or unfavorably represent Witcher. Although Frazho characterized her conversation with Fitzpatrick before the preliminary examination adjournment as "minimal," she did admit that there was a possibility that she could use information revealed in the conversation to Witcher's benefit at trial that would negatively impact Fitzpatrick. This would violate the prohibition on representing a client in the same matter whose interest is materially adverse to the former client. MRPC 1.9(a). The rule allows for such representation where the former client consents; however, Fitzpatrick's objection to the situation was clearly made before the trial court when he objected to Mierendorf continuing as his counsel because of this situation.

Witcher argues that because he did not consent to Frazho's removal, nor was there a showing of "gross incompetence, physical incapacity, or contumacious conduct" on Frazho's part, the trial court had no basis to remove Frazho as his attorney, and thus, violated his Sixth Amendment right to counsel. *People v Johnson*, 215 Mich App 658, 663; 547 NW2d 65 (1996). However, the *Johnson* Court continued, and held that once an attorney is serving under a valid appointment by the court and an attorney-client relationship has been established, the trial court may not arbitrarily or unjustifiably remove the attorney over the objection of both the defendant and counsel; to do so violates a defendant's Sixth Amendment right to counsel. *Id*. at 665-666. Our reading of *Johnson* leads us to conclude that a trial court's ability to remove an attorney only for gross incompetence, physical incapacity, or contumacious conduct on the attorney's part applies where such action was not otherwise required by law. Under circumstances of gross incompetence, physical incapacity, or contumacious conduct, an attorney's removal would be justified and not arbitrary.

In this case, the court's decision to remove Frazho was not arbitrary or unjustified, as it was required to do so by the court rules and Michigan's Code of Professional Conduct. Frazho admitted that there was the possibility of a conflict of interest due to her contact with Fitzpatrick. While it appears that Frazho should not have been appointed in the first place, MCR 6.005(F), once the error was revealed, the court was obliged to remedy the situation to ensure a fair trial for both defendants. Therefore, we find that the court did have a basis for disqualifying Frazho because a potential conflict of interest existed. Accordingly, Witcher's right to counsel was not violated.

B

Next, Witcher alleges two instances of prosecutorial misconduct which he asserts denied him a fair trial. This Court reviews claims of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context to determine whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572,

586; 629 NW2d 411 (2001). Because Witcher failed to object to the prosecutor's comments, ordinarily this Court would review this claim for plain error only. *Id.* In order to avoid forfeiture of an unpreserved claim, a defendant must demonstrate a plain error that was outcome determinative. *Id.* However, Witcher also claims that defense counsel's failure to object constituted ineffective assistance of counsel, which presents a mixed question of fact and law. The trial court's factual findings are reviewed for clear error, while its legal determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Witcher first argues that the prosecutor committed misconduct when, in his closing argument, he compared the facts of this case to the actions of Communists killing American soldiers. Witcher asserts that the prosecutor's remarks only served to inflame the passions of the jurors and invite them to decide the case on a premise other than the evidence. Generally, prosecutors are afforded great latitude regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation and citation omitted). A prosecutor is not required to confine his arguments to the blandest of all possible terms. *Aldrich, supra* at 112. However, a prosecutor may not intentionally inject into trial inflammatory arguments with no apparent justification except to arouse prejudice. *Bahoda, supra* at 271.

We find that, when read in context, the prosecutor's comments do not rise to the level of misconduct. The prosecutor was emphasizing the shooter's ability to shoot to kill, i.e., the type of weapon he had was a military weapon specifically designed to be effective in a combat situation. This related to the intent element of the assault with intent to commit murder charges. We believe that the remarks were not solely intended to inflame the passion of the jury, nor did they invite the jury to convict because of prejudice rather than evidence. Because there was no error, defense counsel's failure to object is immaterial. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Witcher also argues that the prosecutor committed misconduct when he violated a stipulation not to amend its theory of the case by arguing that Witcher used the black van as a weapon in his attempt to kill Sergeant Madsen. The agreement limited the prosecution to arguing that Witcher's use of the van in fleeing from the scene was indicative of his intent to kill. In closing, the prosecutor argued:

> While his partner was still shooting and while they were still being shot at, he backed out, but did he back out in such a way to avoid injuring the van any further than it already had been? No. At this point he used the van itself as a weapon, as a continuing part of his efforts to, number one, kill [Sergeant] Madsen and, number two, help his partner Mr. Fitzpatrick who was still trying to kill [Sergeant] Madsen.

We find that the prosecutor's remark that Witcher "used the van itself as a weapon" violated the agreement, despite the prosecutor's attempt to qualify the remark by stating that it was "as a continuing part" of Witcher's efforts to kill Sergeant Madsen. The prosecutor's earlier comments clearly indicated that the prosecution believed Witcher used a firearm to shoot at the other officers, not Sergeant Madsen.

However, the jury was given an aiding and abetting instruction regarding Witcher's participation. The prosecution did argue that in driving the van, Witcher assisted Fitzpatrick in

his attempt to kill Sergeant Madsen, a plausible scenario that the jury was entitled to believe. Additionally, there was evidence of more than one shooter. The jury was entitled to believe the prosecution's theory that the other shooter was Witcher, who was focused on shooting Sergeant Hultink and Officer Rivera, thereby allowing Fitzpatrick to focus on shooting Sergeant Madsen. Moreover, the jurors were instructed that the attorney's arguments are not evidence and they are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Under these circumstances, we conclude that Witcher was not denied a fair trial because the error was not outcome determinative. *Watson, supra* at 586. We also find that Witcher's claim of ineffective assistance of counsel claim for defense counsel's failure to object to the prosecutor's remark is without merit because there was not a reasonable probability that, but for counsel's error, the result would have been different. *Bell v Cone*, 535 US 685, 694; 122 S Ct 1843; 152 L Ed 2d 914 (2002). Likewise, because mention of the alternative theory in the prosecution's closing argument was harmless, we find no merit to Witcher's contention that it created a fatal variance between the information and the proofs at trial.

C

Witcher also argues that the evidence was insufficient to support his assault with intent to commit murder convictions. In reviewing the sufficiency of the evidence in a criminal case, this Court must view de novo the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

To prove the crime of assault with intent to murder, the prosecutor must establish: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. The intent to kill may be proven by inference from any facts in evidence. *Hoffman, supra* at 111. The jury was also instructed on aiding and abetting. A conviction for aiding and abetting requires proof that:

> (1) the underlying crime was committed either by the defendant or some other person, (2) the defendant performed acts or gave encouragement which aided and abetted the commission of a crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement. [*People v Wilson*, 196 Mich App 604, 609; 493 NW2d 471 (1992), quoting *People v Genoa*, 188 Mich App 461, 463; 470 NW2d 447 (1991).]

To establish aiding and abetting of a crime, the prosecution must show that someone committed the underlying crime, and that the defendant either committed or aided and abetted the commission of that crime. Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show that a person is an aider and abettor. *Wilson, supra* at 614.

Witcher asserts that there was no evidence to support an intent to kill on his part; that the evidence only established that he was present in the van. We disagree. The evidence established that Witcher was in the driver's seat during the shoot-out and testimony suggested that at least two shooters were present in the van, one in the front and one in the middle of the van. The shooting began while all three officers were standing in close proximity to each other, resulting in Sergeant Hultink being shot in the left hip. Sergeant Hultink and Officer Rivera then moved in one direction, while Sergeant Madsen moved in another direction, each continuing to take fire. The ballistic evidence indicated that the shots from the van covered a wide area. Also, it could be inferred from the evidence that the other shooter was Witcher, who was focused on shooting Sergeant Hultink and Officer Rivera, thereby allowing Fitzpatrick to focus on shooting Sergeant Madsen. Additionally, Witcher drove the van extremely close to Sergeant Madsen and the jury could infer that he intended to give Fitzpatrick a better shot at Sergeant Madsen.

Witcher contends that any direct involvement by him, other than driving the van, is pure speculation and that the testimony as to whether there was more than one shooter in the van was not reliable. However, credibility determinations are left in the province of the jury. *Avant, supra* at 506. Also, it is for the trier of fact rather than this Court to determine what inferences can be fairly drawn from the evidence and to determine the weight to be accorded to the inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Additionally, because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984). Thus, viewing the evidence in the light most favorable to the prosecution, we believe that a jury could find beyond a reasonable doubt that Witcher was guilty of three counts of assault with intent to commit murder.

D

Witcher next argues that the trial court misscored offense variables 6, 10, 12, and 19. We find that any error in scoring these particular variables is irrelevant because even if Witcher's offense variable scores were reduced in accordance with his arguments, the overall offense variable level would not change. At sentencing, Witcher's offense variable score was 196 points for his assault with intent to commit murder convictions, placing him at offense variable level VI, 100+ points. MCL 777.62. His offense variable score for his felon in possession of a firearm conviction was 126 points, placing him at offense variable level VI, 75+ points. MCL 777.66. If this Court were to agree with Witcher's arguments regarding the challenged offense variables, his new score would be 111 points and 91 points, respectively.[2] Thus, in each case, Witcher's score would still place him at offense variable level VI, a fact that he concedes.

E

[2] Only three of the four challenged offense variables are scored for a felon in possession of a firearm conviction, accounting for the greater point deduction in the offense variable score for the assault with intent to commit murder convictions.

Finally, Witcher argues that the court did not have objective and verifiable substantial and compelling reasons to depart from the sentencing guidelines range on counts III and V. These counts correspond to Witcher's convictions for assault with intent to commit murder relating to Sergeant Madsen and Officer Rivera. We disagree. Nevertheless, we remand for resentencing for the following reason.

Parole eligibility is not a valid sentencing consideration. *People v Wybrecht*, 222 Mich App 160, 173; 564 NW2d 903 (1997); *People v Biggs*, 202 Mich App 450, 456; 509 NW2d 803 (1993). In *Biggs*, the Court held that the trial court erred in imposing a life sentence under the erroneous belief that a life sentence would make the defendant eligible for parole sooner than a long term of years and concluded that remand for resentencing was required. *Biggs, supra* at 456.

Similarly, in this case, the court's comments certainly indicated that it accepted the probation department's recommendation for a term of years sentence on two of the counts in part because Witcher would be eligible for parole at a later date than under his life sentence on the other count. This is a misunderstanding of the law. A sentence of parolable life is not invariably greater than a term of years or vice versa, and the court needs to be aware of the applicable law when sentencing. *People v Carson*, 220 Mich App 662, 672-678; 560 NW2d 657 (1996). A trial court's misapprehension of the law can invalidate a sentence. *People v Moore*, 468 Mich 573, 579; 664 NW2d 700 (2003). Therefore, we vacate Witcher's sentences of 50 to 75 years' imprisonment.

We recognize that this error could be harmless. *People v Mutchie*, 468 Mich 50, 52; 658 NW2d 154 (2003). However, the court's comments on the record in this case do not indicate that, regardless of the parole eligibility issue, it nevertheless would have departed from the guidelines. Accordingly, we remand for resentencing before a different judge to preserve the appearance of justice. *People v Hill*, 221 Mich App 391, 398; 561 NW2d 862 (1997).

Defendants' convictions and sentences are affirmed, except for defendant Witcher's sentences on counts III and V, which are vacated, and the case remanded for resentencing on these counts before a different judge. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski